SINGAPORE REPORTS

KIM TAW ELECTRIC SAWMILL CO. (PTE.) LTD. v. ANN EE SIONG

[C.A. (Wee Chong Jin C.J., D'Cotta & Rajah JJ.) March 24, 1980]

[Singapore — Civil Appeal No. 85 of 1979]

Tort — Negligence — Duty to provide safe system of work — Lorry parked lop-sided — Logs rolling off lorry injuring plaintiff — Res ipsa loquitur — Appeal — Both parties found equally liable.

Employment — Employers' duty to provide safe system of work — Injury caused by logs rolling off parked lorry — Res ipsa loquitur — Appeal.

CIVIL APPEAL.

Joe Chellam for the appellant.

Chiam See Tong for the respondent.

This was an appeal against the decision of the High Court (see [1980] 1 M.L.J. 6). At the conclusion of the appeal, Wee Chong Jin C.J. delivering the oral judgment of the court reversed the findings of fact of the trial court as to how the logs rolled off the lorry. The Court of Appeal accepted the defendant's version as to why the logs rolled off the lorry, that it was the plaintiff who knocked off the last wedge in the lorry, causing the logs to roll off.

Their Lordships also found that the system of work adopted by the defendant/appellant company was not safe, since it involved the human agency to knock off the wedges. It was the view of their Lordships that since persons were required to knock off the wedges, an accident may happen if the persons involved in knocking off the wedges were careless or negligent. In the premise, their Lordships found both the respondent and the appellant equally to blame for the accident and consequently, damages for the respondent were reduced by half and the respondent was ordered to pay the costs of the appeal to the appellant.

Order accordingly.

Solicitors: *Joe Chellam; Chiam & Co.*

HARRY LEE WEE v. PUBLIC PROSECUTOR

[A.Cr.J. (Choor Singh J.) March 12, 1980]

[Singapore — Magistrate's Appeal No. 161 of 1978]

Criminal Law and Procedure — Charge of accepting restitution of property in consideration of concealing an offence — Solicitor accepting restitution to conceal offence by assistant — Sentence — Power of District Court — Criminal Procedure Code (Cap. 113), s. 17 — Penal Code, ss. 71 and 213 — Federal Constitution, art. 7(1).

Legal Profession — Solicitor — Accepting restitution of property in consideration of concealing an offence by assistant — Delay in reporting offence — Penal Code, s. 213.

Penal Code, s. 213 — Solicitor accepting restitution of property in consideration of concealing of offence by assistant.

Evidence — Evidence of accomplice — Subsequent conduct of accomplice.

Constitutional Law — Punishment greater than prescribed at time of commission of offence — Power of court to try offence — Federal Constitution, art. 7(1).

In this case the appellant was charged under section 213 of the Penal Code with eight charges of obtaining restitution in consideration of the concealment of the offence of criminal breach of trust committed by his assistant; and one charge of attempting to obtain such restitution. He was convicted in the District Court and fines totalling $30,000 were imposed on him. The appellant appealed.

Held: (1) section 213 of the Penal Code does not require the actual concealment of an offence or the screening of any person from legal punishment or the actual forbearing of taking any proceedings. It is sufficient if an illegal gratification is received in consideration of a promise to conceal an offence or screen any person from legal punishment or desist from taking any proceedings;

(2) in this case the evidence showed that the restitution referred to in the first eight charges was accepted in consideration of concealing the offences of the assistant and the appellant was therefore rightly convicted on these charges;

(3) in regard to the ninth charge on the evidence there was no question of concealing the offence and the conviction on this charge must therefore be set aside;

(4) by virtue of the amendments to section 17 of the Criminal Procedure Code, a District Court can impose on a person convicted at one trial of any two or more distinct offences fines totalling more than $10,000;

(5) in this case the learned District Judge had not given sufficient consideration to the matters favourable to the appellant and in the circumstances, the fines should be reduced to $1,500 on each charge.

Cases referred to:-

(1) *Hem Chandra Mukherjee & Anor.* v. *Emperor* A.I.R. 1925 Cal. 85.

(2) *Biharilal Kalacharan* v. *Emperor* A.I.R. 1949 Bom. 405.

(3) *Reg.* v. *Kilbourne* [1973] A.C. 729, 746.

MAGISTRATE'S APPEAL.

J.B.R. Hazan Q.C. (*M. Rubin* with him) for the appellant.

E.C. Foenander (*Sowarun Singh* with him) (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Choor Singh J.: The first question to be decided in this case is, what is the plain meaning of section 213 of the Penal Code which reads as follows: —

"213. Whoever accepts, or agrees to accept, or attempts to obtain any gratification for himself or any other person, or any restitution of property to himself or any other person, in consideration of his concealing an offence, or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment, shall, if the offence is punishable with death, be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine; and if the offence is punishable with imprisonment for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine; and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both."

There is no reported decision in Singapore or Malaysia but there are two cases reported in India in which this section was considered. The first case is that of *Hem Chandra Mukherjee & Anor.* v. *Emperor.*[1] This is a decision of the Calcutta High Court in which a Divisional Bench of that court (Newbould and Mukerji, JJ.) came to the conclusion that there must be an actual concealment of an offence, or screening of

a person from legal punishment, or obstruction from proceeding criminally against a person in order to attract the application of section 213 of the Penal Code. There would be no offence if a gratification was accepted merely on a promise to conceal, screen or abstain and nothing more. Mukerji J. who delivered the opinion of the court, explained the matter, thus, at page 86: —

"... Where there has been no concealing, screening or abstention no act or omission has been done affecting public justice; the mere acceptance or attempt to obtain or agreement to accept the gratification or restitution is an offence against property. If the accused has no intention to fulfil his part of the transaction, it would amount to an offence of cheating; if he has the intention, but does not carry it out, he does not commit any offence in law, however immoral his conduct may be.

A very strong argument in support of this view is afforded by the language of the section itself and a comparison of it with the language of some other sections of the Code. Section 213 says 'in consideration of his concealing an offence or of his screening any person from legal punishment for any offence or of his not proceeding against any person for the purpose of bringing him to legal punishment' and not in consideration of his agreeing or promising to conceal, etc. That the legislature was not unaware of the distinction between the two positions is not imaginable and is further evident from the language used in the first part of the section itself. Similar language has been used in section 214 while in section 215 the words are 'under pretence or on account of helping etc.'

Upon the plain words of section 213, therefore, a promise or agreement or pretence of concealing or screening is not punishable...."

The second case is a decision of the Bombay High Court in *Biharilal Kalacharan* v. *Emperor*,[2] in which a Divisional Bench of that court (Chagla C.J. and Gajendragadkar J.) held that section 213 of the Penal Code does not require the actual concealment of an offence or the screening of any person from legal punishment or the actual forbearing of taking any proceedings. It was held that it is sufficient if an illegal gratification is received in consideration of a promise to conceal an offence or screen any person from legal punishment or desist from taking any proceedings. Once a person accepts a gratification and if the consideration for accepting that gratification is his concealing the offence or screening the person from legal punishment, the offence is complete. Chagla C.J. who delivered the opinion of the court, explained the matter as follows, at page 406: —

"... Mr. Lulla contends that the Legislature does not enact that if a person receives gratification in consideration of his agreeing or promising to conceal an offence, or screen any person from legal punishment, he would be guilty of an offence. According to Mr. Lulla, if the Legislature intended to punish even an agreement or promise to conceal or screen, then those words should have found a place in the section. In our opinion, there is very good reason why those words do not find a place in the section. Because if those words had been placed there by the Legislature then the consideration would have referred only to something to be done in future. It would not have covered the case of past consideration. The neutral word used by the Legislature 'consideration' is wide enough to cover both cases, the case of something having been done or achieved in the past and also the case of something to be done in *future*. The other difficulty that arises if we were to accept the interpretation put upon the section by Mr. Lulla is as to the point of time when it could be said that the offence was complete. If we accept Mr. Lulla's interpretation, then the offence would not be complete when the accused received the gratification, but it would only be complete when the offence was concealed or a person was screened from legal punishment. Therefore, if the accused took a gratification after having promised to conceal the offence or screen the person giving gratification from legal punishment if he chose to break his promise and not stand by his agreement then no offence would be committed, although he received both the gratification and committed a breach of the agreement *quae* the person who gave him the money. But the offence according to Mr. Lulla would only be committed if he received the gratification and further went on to keep his promise and abide by his agreement. Unless the words of the section were clear and plain and compelled us to place that interpretation upon it, we think that the interpretation suggested by Mr. Lulla results in serious difficulties and anomalies and should not be accepted...."

The decision in *Chandra Mukherjee's* case was considered but the court declined to accept it on the ground that it was not a correct decision.

As was pointed out by Chagla C.J. in *Kalacharan's* case, "in law a consideration may be as much a promise as something actually done or achieved". In my opinion when a person receives gratification in return for his promise to conceal an offence, he is clearly receiving it "in consideration of his concealing an offence" within the meaning of section 213 of the Penal Code.

In my judgment, section 213 does not require the actual concealment of an offence or the screening of any person from legal punishment or the actual forbearing of taking any proceedings. It is sufficient if an illegal gratification is received in consideration of a promise to conceal an offence or screen any person from legal punishment or desist from taking any proceedings. Chief Justice Chagla has correctly construed section 213 of the Penal Code in *Kalacharan's* case and I respectfully agree with him.

The appellant was convicted by a District Court on nine charges under section 213 of the Penal Code and fines totalling $30,000 were imposed on him.

The allegation in the first eight charges was that he had obtained restitution from one S. Santhiran in consideration of his concealing offences of criminal breach of trust committed by the said Santhiran. In the ninth charge the allegation was that he attempted to obtain such restitution.

I propose to deal, first, with the first eight charges. The amount of restitution and the date on which it was received was set out in the eight charges as follows: —

Charge	*Date*	*Amount of restitution*
1st Charge	4.3.76	$39,181.31
2nd „	9.3.76	79,751.08
3rd „	10.3.76	20,877.68
4th „	11.3.76	87,146.05
5th „	12.3.76	41,000.00
6th „	10.5.76	8,000.00
7th „	14.5.76	1,000.00
8th „	10.6.76	21,000.00
		$297,956.12

The appellant is an advocate and solicitor of the Supreme Court of Singapore. He has been in practice in Singapore since 1948. He is the sole proprietor of the well-known firm of Braddell Brothers. Since the commencement of the Legal Profession Act in 1966, he has been a member of the Council of the

Law Society. He was President of the Law Society in 1975 and 1976.

The charges against the appellant arose from offences of criminal breach of trust committed in the years 1972 to 1976 by one Sivagnanam Santhiran, a legal assistant employed by the appellant in his firm of Braddell Brothers. In May 1978, Santhiran was convicted in a District Court, on his plea of guilty, on a charge of criminal breach of trust of $147,510.04. He also admitted four other similar charges which were taken into consideration for the purpose of sentence. Santhiran was sentenced to nine months' imprisonment.

To bring home the first eight charges, the prosecution had to prove in respect of each charge:

(1) that Santhiran had committed criminal breach of trust;

(2) that the appellant had knowledge of Santhiran's criminal breach of trust;

(3) that the appellant demanded restitution;

(4) that restitution was made by Santhiran; and

(5) that the appellant accepted restitution in consideration of his concealing Santhiran's criminal breach of trust.

There was clear evidence in respect of the first four ingredients. They were admitted and were never challenged. The only contest was in respect of the fifth ingredient. The crucial issue before the learned District Judge was whether or not the appellant had accepted the restitution in consideration of his concealing the offences of criminal breach of trust committed by Santhiran.

Santhiran's evidence on this issue was as follows. When criminal breach of trust on his part was discovered, he was called by the appellant to the conference room in their office. He and the appellant were the only two persons in the room. The appellant showed him the clients' ledger and pointed out entries in specific accounts in the ledger. Six accounts were referred to. Then the appellant asked him if he had receipts for those monies paid out. He replied that the accountant had gone through the accounts; that they were in order and that there were no complaints. The appellant did not believe what he said. The appellant told him not to talk rubbish and resorted to abuse. Upon hearing further abuses thrown at him, he told the appellant that he had taken the money as "his share of profits or as arrangements with clients". He also told the appellant that there were no complaints from clients and that all those matters had been completed. On hearing this the appellant hurled further abuse at him and became "rather incoherent". He was "practically raving and ranting" whilst speaking to him. A lot of obscenities were uttered. He was threatened and told that he had no business to take his share of profits in that way. The appellant asked him to return immediately all the money in respect of the six accounts in the ledger pointed out to him. When the appellant demanded the return of the money, he told the appellant that he had no money. The appellant then threatened to report him to the Law Society. The moment the appellant spoke of reporting him to the Law Society, he told the appellant that he would return the monies in the six accounts immediately.

The interview then ended because the appellant had to attend a meeting of the Law Society. Before leaving, the appellant told him to go through the accounts with the accounts clerk to see if there were any other defalcations and after that to add up the total amount involved and to telephone him at his house at 32 Parbury Avenue.

Santhiran telephoned the appellant at his house in the evening and told him that the figure stood as it was when he left the office. The figure was $39,181.31 which is the amount mentioned in the first charge. The appellant told him that he wanted the money on the following day.

The next day Santhiran went to the Singapura Building Society where he had made fixed deposits. He withdrew sufficient money to make the required payment of $39,181.31. Then he went to his bank, the United Commercial Bank where he purchased six manager's cheques made payable to Braddell Brothers in the following sums: —

Ex. 21	$ 6,597.69
21A	5,631.94
21B	1,374.28
21C	5,276.29
21D	20,184.51
21E	116.60
Total:	$39,181.31

These six cheques represented specific repayments by Santhiran and these sums were subsequently returned to the accounts of the following six clients of Braddell Brothers: —

Chin Kiang Plastic & Paper Company	6,597.69 (Ex. P.21)
Velasamy	5,631.94 (Ex. P.21A)
Cheok Peng Ng Lee	1,374.28 (Ex. P.21B)
Estate of Lo Lai Seng	5,276.29 (Ex. P.21C)
Java-Singapore Trading Company	20,184.51 (Ex. P.21D)
Thiagarajah s/o Suppiah	116.60 (Ex. P.21E)
	$39,181.31

Santhiran handed these cheques to the appellant. According to Santhiran, the appellant was very happy and told him to carry on with his work.

Santhiran's defalcations must have been discovered on Wednesday, March 3, 1976 because these six cheques are all dated March 4, 1976. There is a dispute as to when they were handed to the appellant but I do not think that date is of any material importance. They must have been purchased by Santhiran on Thursday, March 4, 1976 as claimed by him. They bear that date.

Santhiran's evidence is that on Saturday, March 6, 1976 the appellant told him that the staff of the firm were going through the accounts and that he wanted to see Santhiran at his house in Parbury Avenue on the next evening at 8.30 p.m. or 9 p.m. Santhiran went to the appellant's house as instructed.

The moment Santhiran stepped into the appellant's house, the appellant produced a list showing defalcations to the extent of $395,000. The appellant asked him whether he had checked the files to ascertain the total amount involved. He told appellant that he had done so and many files had receipts and many were without receipts. He repeated that he had taken the monies as "his share of profits or commissions from clients". The appellant told him that he did not believe his story and that he wanted the immediate payment of $300,000 less the amount already refunded. He asked the appellant why he should repay the money. The appellant abused him and threatened him that if he did not repay the money immediately, he would report him to the Law Society. On hearing this, he realised that what he had done was unethical; that the appellant was the President of the Law Society; that the appellant was not going to acknowledge that he was entitled to profit-sharing or commission from clients and that if the matter was referred to the Law Society he would be in deep trouble. He then told the appellant that he would let him have the money; that he would try and pay back the money in the next few days and what he could not, he would pay by instalments. He told appellant that he would pay $250,000 immediately. Santhiran claims that upon hearing this the appellant made a complete about-turn and told him that he (the appellant) would know "how to handle the matter"; that he would know "how to settle the accounts" and would give him some money after the whole thing was settled. Appellant also told him that he would be getting his (Santhiran's) practising certificate for the year 1976/77.

Because of the assurance received from the appellant, Santhiran made rapid restitution, as can be seen from the dates of the charges. Apart from the $39,181.31 already repaid on March 4, 1976 which is the subject of the first charge, Santhiran repaid on March 9, $79,751.08, on the next day March 10 another $20,877.68, on the next day March 11 another $87,146.05 and on the next day March 12 another $41,000. Two further payments were made in May 1976 and the last payment of $21,000 was made on June 10, 1976. Santhiran had refunded by June 10, 1976 the total sum of $297,956.12.

The appellant's version is this. It was the 2nd or March 3, 1976 when he was informed of Santhiran's defalcations. He was bewildered and found it difficult to accept that a lawyer would commit breach of trust. He then sent for Santhiran. He pointed out entries in the ledger to Santhiran who remained silent. He then pointed out further entries. Santhiran still remained silent. He then raised his voice and asked Santhiran to give him an answer. He told Santhiran that if it was true that he had taken money, he had brought great shame upon himself, his family and "on us in the firm". He did not make any mention of a threat to "report him to the Law Society in certain circumstances or not to report him to the Law Society in certain circumstances". He did not make any promise to Santhiran that he would not "tell any authority if he repaid the money". The appellant claimed that at the conclusion of that interview Santhiran began to become very repentent and sorry and said that he would find the monies to mitigate what he had done.

Under cross-examination, the appellant admitted scolding Santhiran but denied abusing him. The appellant admitted that he called Santhiran a liar. He admitted further that he demanded the return of all monies taken by Santhiran.

As regards the meeting in the appellant's house at Parbury Avenue the appellant claimed that Santhiran asked him if he could have more time "to produce evidence in respect of various lists that have been shown to him from time to time in the earlier part of the week". Santhiran was alleged to have said that he wanted to repay the monies he had taken. Appellant told him that he had been making himself a little bit of a nuisance in the office; that he had been hysterical and emotional and this had upset the staff. Appellant told him further that "until he could prove that the clients had received the money he should refund what he had taken". Santhiran agreed but asked for time. The appellant agreed to a reasonable time. This is all that the appellant told the trial judge regarding what took place at the meeting at the appellant's house. There is no reference at all to abuse or threat and no denial of Santhiran's claim that he was threatened that if he did not pay up he would be reported to the Law Society.

Under cross-examination the appellant admitted scolding Santhiran at this meeting but denied abusing him. He admitted that he was not very friendly with Santhiran at this meeting. The appellant also denied promising Santhiran that if he repaid $300,000 the appellant would not report him to the Law Society.

It is contended on behalf of the appellant that the case against him was based entirely on the evidence of Santhiran; that Santhiran was not only an accomplice but also a thoroughly dishonest and unreliable witness and therefore the appellant should have been acquitted at the close of the prosecution's case. Reliance is placed on the following passage in the judgment of Lord Hailsham in *Regina* v. *Kilbourne*,[3] at page 746: —

> "... Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroboration in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witness's testimony falls of its own inanition the question of his needing, or being capable of giving, corroboration does not arise...."

Counsel for the appellant has however failed to take notice of the following passage which appears on the same page:

> "They (the jury) must look at the evidence as a whole before asking themselves whether the evidence of a given witness is credible in itself and whether, if otherwise credible, it is corroborated...."

This is exactly what the learned District Judge did at the close of the case for the prosecution. He did not consider Santhiran's evidence in isolation. He considered it in the light of all the evidence tendered by the prosecution and he found that Santhiran was in his opinion "truthful in his evidence as regards the

agreement or arrangement he had with the accused to make restitution in consideration of the accused concealing his offence". Having found that Santhiran's evidence on the issue before him was credible and realising that Santhiran was an accomplice, the learned District Judge then looked for corroboration of Santhiran's evidence. The learned District Judge has stated in his judgment that he "looked for supporting evidence" and found it "in abundance in the evidence of other witnesses and, above all, in the conduct of both the accused and Santhiran in this entire episode".

Counsel for the appellant submits that the learned District Judge has here misdirected himself because a witness cannot corroborate himself and that the learned District Judge is clearly in error when he states that Santhiran's evidence is corroborated by his conduct.

It is true that a witness cannot corroborate himself, much less can an accomplice, but the learned District Judge was quite clearly not referring to any statement made by Santhiran as evidence providing corroboration of the alleged arrangement. He was referring to the subsequent conduct of Santhiran which in his opinion lent support to Santhiran's assertion that there was in fact such an arrangement. The conduct of an accomplice is always relevant evidence and if it supports his evidence it can be taken into consideration. As to what weight should be given to such conduct depends entirely on the circumstances of the case.

In the present case, the fact that initially Santhiran made very rapid restitution clearly tends to support Santhiran's claim that there was an arrangement to conceal his offences. It is submitted that Santhiran made such rapid and substantial restitutions not because of any arrangement between the parties but because he was repentent and sorry for what he had done. This contention is not borne out by the evidence. Santhiran after a while, suspected that the appellant was not going to keep his part of the bargain. Santhiran raised all sorts of difficulties. He did not give his full cooperation in the investigations that were being carried out by the staff of Braddell Brothers and later by independent accountants to ascertain the full amount of his defalcations. He was quite obviously endeavouring to keep back as much money as was possible. This is admitted by the appellant. It was clearly not the conduct of a repentent or remorseful man.

Then again, Santhiran continued to work with Braddell Brothers without any salary for ten months after the discovery of his defalcations. What was the incentive for him to do that? There could be only one incentive, the concealment of his offences from the proper authorities. So much for Santhiran's conduct.

The appellant's conduct lends much more support to Santhiran's claim that there was an arrangement for the covering up of his offences.

First, the appellant did not expeditiously report Santhiran's offences, neither to the Law Society nor to the police. He did so only when he could no longer help it — some 13 or 14 months after the offences were discovered. The appellant explained the delay as follows: —

> "I did not report the discovery made in early March to the Law Society or the police .... because the whole thing was in an utter mess.
>
> I had no idea what the extent was. I had to discover and check the full extent before reporting it.
>
> In the early days of the discovery, I would have had nothing concrete to offer to the police or the Law Society."

All this is very far from the truth. The defalcations were discovered in the first week of March 1976 and before the month of March was out, Santhiran had not only admitted criminal breach of trust but had also made restitution of the total sum of $267,956.12. As already stated, Santhiran handed the appellant on March 4, 1976, six cheques (Exhibits P21 to P21E) totalling $39,181.31. These six cheques were for sums taken from the accounts of six different clients of Braddell Brothers, and upon receipt of these cheques, the amounts were credited to the accounts of those clients. Here was not only concrete evidence of six acts of criminal breach of trust but also evidence sufficient to warrant Santhiran's conviction. The truth of the matter is that the appellant did not wish to report Santhiran's defalcations. By reporting him, the appellant would be breaching his bargain with Santhiran who would not only immediately stop his cooperation in the investigations that were going on but also stop making restitution. A further fear on the part of the appellant was that if he reported Santhiran to the police, they would be interested only in getting a conviction against Santhiran on the amounts already refunded and they may not carry out further investigations thoroughly and relentlessly to discover the full amount of the defalcations. The appellant admitted this fear in cross-examination. The appellant's explanation for the delay in reporting the matter to the police was not a very honest one.

Much has been made of the fact that the appellant saw the Attorney-General in connection with Santhiran's offences. In the first place, the appellant saw the Attorney-General over a year after the offences were discovered. Secondly, the Attorney-General not having been called, we do not know what the appellant told the Attorney-General. Solicitors often see the Attorney-General in order to persuade him to drop a charge against their client or to reduce the charge to that of a lesser offence. No one ever sees the Attorney-General to report a crime. The Attorney-General is not a policeman. Reports of crimes must be made at a police station in compliance with the provisions of section 114 of the Criminal Procedure Code. The fact that the appellant saw the Attorney-General is, in the circumstances of this case, of no help at all to the appellant.

It is submitted by counsel for the appellant that the delay in reporting the matter to the police was an error of judgment on the part of the appellant. This is not borne out by the evidence which shows that the delay was calculated, purposeful and motivated and therefore it could not be an innocent error of judgment.

The evidence shows that the appellant consciously concealed the offences committed by Santhiran. The

appellant instructed his legal assistant named Thillianathan who was the first person to discover Santhiran's defalcations, to tell all the other legal assistants "to keep the matter within themselves".

The appellant had a suspense account opened in the firm's ledger and the restitutions made by Santhiran were first entered in this suspense account. The appellant was the person who suggested the title of this suspense account. When questioned on this suspense account by R. Subramaniam, an audit clerk from Turquand Youngs & Company who were his firm's auditors, the appellant professed ignorance and stated that Santhiran would be the best person who would know about it.

The appellant failed to inform his auditors of Santhiran's defalcations until he was confronted by Victor Fernandes an accountant from Turquand Youngs. Even then he put him off by saying that he would like to discuss it "in greater detail at a more convenient time". He even suggested to Fernandes, quite improperly, that the amount in the suspense account could be treated as income for the year ending December 1976. In March 1977, when two partners of Turquand Youngs saw him regarding the suspense account, he threatened to dismiss Turquand Youngs as his auditors when they insisted on giving publicity to Santhiran's defalcations in their report to the Law Society.

The appellant made exhortations of secrecy in respect of Santhiran's offences to various people at various times. For example he heavily stressed to Mr. Jamshed Medora, a chartered accountant in the firm of Medora & Tong whom he approached to carry out an independent investigation, that the matter must be kept from Turquand Youngs until Medora & Tong had finalised their report.

The appellant's conduct in allowing Santhiran to continue in practice as a senior legal assistant in Braddell Brothers after the discovery of the misdeeds was yet another confirmation that the appellant had agreed not to reveal his offences which would have exposed him as a dishonest person quite unfit to continue as a member of the Bar. The appellant even obtained a practising certificate for Santhiran, to which he would not have been entitled if his offences had been disclosed to the Law Society.

When an advocate and solicitor applies for the yearly renewal of his practising certificate he has to comply with the provisions of section 29(1)(c) of the Legal Profession Act. He has to produce an accountant's report or a certificate from the Council of the Law Society that owing to the circumstances of his case such a report is unnecessary. To obtain Santhiran's practising certificate in late March 1976 a certificate from the Council of the Law Society was produced. I feel certain that the Council of the Law Society would not have issued their certificate if it had been reported to them that Santhiran had committed criminal breach of trust. It would appear that Santhiran's practising certificate was obtained by deception to which the appellant was a party.

There is also the evidence of two independent and reliable witnesses which lends further support to the case against the appellant. They are N. Subramaniam and Wong Siong Poon, both accountants and partners in Turquand Youngs. They heard on March 9, 1977 from one of their accountants named Fernandes who was carrying out the yearly audit of the accounts of the appellant's firm that there was a suspense account representing monies returned by an employee of Braddell Brothers who had committed criminal breach of trust. They were concerned with the appellant's failure to inform Turquand Youngs of the defalcations when they were discovered and they saw the appellant to discuss the suspense account. Subramaniam and Wong expressed the view that an investigation had to be carried out by Turquand Youngs before the accountant's report, required under section 29(1)(c) of the Legal Profession Act, could be issued by them. They expressed the further view that there was a breach of the solicitors' accounts rules and that it was their responsibility, as reporting accountants, to draw the attention of the Law Society to such a breach. The appellant insisted that there was no need for an investigation on their part and that they need not refer to Santhiran's defalcations in the accountant's report as he himself had not committed any breach of the rules. The appellant told them that if they were unable to issue an unqualified report, he would have no alternative but to terminate their services. The evidence of Subramaniam and Wong shows quite clearly that even in March 1977 i.e. a year after the defalcations were discovered, the appellant was still resisting the disclosure of Santhiran's offences. By March 1977 Santhiran had already left Braddell Brothers. He had started his own practice. He had stopped cooperating in the investigations, had made no restitution after June 1976 and yet the appellant was not prepared to have his offences disclosed to the Law Society.

The appellant had told Santhiran at the meeting at the appellant's house in Parbury Avenue, when Santhiran told him that he would refund $250,000, that he knew "how to handle the matter" and "how to settle the accounts". It would appear that the appellant's scheme was that after Santhiran had made full restitution, he would request Santhiran to get himself voluntarily struck off the rolls and he would then try and persuade the Attorney-General not to prosecute Santhiran on the ground that full restitution had been made and that Santhiran had been struck off the rolls on his own application. This is borne out by what he told Medora to do. The appellant requested Medora in April 1977 to inform Santhiran that if he would make restitution of a further sum of $26,290.12, or if he provided a guarantor who would make good that sum and get himself voluntarily struck off the rolls, then that would be the end of the whole matter and no report would be made to the police. This attempt to obtain $26,290.12 is the subject-matter of the 9th charge. Santhiran rejected this offer but it confirms the appellant's very clear intention not to report to the police. When Santhiran rejected this offer, the appellant reported him to the Law Society as well as the police.

In the light of all this evidence, how can it be said that the restitution was not accepted in consideration of concealing Santhiran's offences.

Restitution was accepted by the appellant. Santhiran's offences were concealed by the appellant for more than a year. And Santhiran did not make restitution out of remorse. There is no evidence that he was repentent, sorry or remorseful. He made restitution out of fear of being reported to the Law Society which would have resulted in his being struck off the rolls. This fear in Santhiran was raised by the appellant at the meeting in the conference room of Braddell Brothers and again at the meeting in the appellant's house which took place a few days later. At both meetings, only the appellant and Santhiran were present and in the circumstances corroboration of threats made by the appellant cannot be expected from an eye-witness. Corroboration can come only from inferences from the rest of the evidence in this case. The appellant admitted shouting at Santhiran, scolding him, calling him a liar and being angry, heated and rude to him. Santhiran claimed that he was abused in no uncertain terms and threatened that if he did not pay up he would be reported to the Law Society. The fact that Santhiran immediately made frantic efforts at restitution considered in the light of all the evidence already narrated leaves one in no doubt at all that the appellant must have threatened Santhiran that if he did not make restitution, his offences would be reported to the Law Society.

If an employer tells an employee who has committed criminal breach of trust of property belonging to the employer: "If you don't make restitution I will report you" there is an implied promise that if restitution is made the employee will not be reported and the offence will be concealed. The employer may have no intention at all of keeping the underlying promise and concealing the offence but if the employer's words and conduct lead the employee to believe that his offence will be concealed and as a result of that belief he makes restitution, the offence under section 213 of the Penal Code is made out because in those circumstances the employer is clearly accepting the restitution in consideration of concealing the employee's offence. The evidence shows that that is exactly what happened in this case. Santhiran made frantic restitution believing that his offences would be concealed by the appellant.

It is submitted on behalf of the appellant that the learned District Judge did not give sufficient consideration to the evidence of Ramanujan who gave evidence for the defence. Ramanujan was an accountant employed by Medora and Tong who were carrying out an independent investigation to ascertain the full extent of Santhiran's defalcations. Ramanujan did the investigation on behalf of his firm at Braddell Brothers in November and December 1976 and he came to know Santhiran. In January 1977 when Santhiran had already left Braddell Brothers and was practising on his own, he saw Ramanujan and requested him to find out from the appellant "that if he paid up whatever balance was due to him, would he drop the action against him?" Ramanujan saw the appellant who told Ramanujan that "it was not a question of money but of principle" and that "he could not drop any action whatsoever". Subsequently Santhiran contacted Ramanujan on the telephone and was told what the appellant had stated. Now, the argument advanced is that if there had been any agreement or promise to conceal Santhiran's offences in consideration of restitution, Santhiran would have complained to Ramanujan that the appellant had broken the agreement and that as Santhiran made no such complaint to Ramanujan, it proves that there was never any such agreement or promise.

In my opinion this is a completely negative argument devoid of any merit. Santhiran had no reason at all to complain to Ramanujan because Ramanujan was not the person who brought about the agreement or promise. He played no part in it and was not responsible for it in any way and therefore there were no grounds at all for Santhiran to complain to him about it or even to discuss it. I agree with the view of the learned District Judge that the evidence of Ramanujan is of no significance at all. This conversation between Ramanujan and Santhiran took place in January 1977 some seven months after the last alleged offence committed by the appellant. Santhiran had left Braddell Brothers and had already by then lost faith in the appellant's promise to conceal his offences. He was merely seeking confirmation of his belief that the appellant would soon expose his crimes and endeavouring if possible to prevent it by offering to pay the balance. Ramanujan's evidence is of no help to the appellant. It does not prove that the appellant never made any promise to conceal Santhiran's offences.

The learned District Judge states in his judgment that he gave very anxious consideration to the evidence in this case. I have done the same and I cannot find any ground for setting aside the appellant's convictions on the first eight charges. These convictions are confirmed.

As regards the 9th charge which alleges an attempt to obtain from Santhiran restitution through Medora of a further sum of $26,290.12 in consideration of concealing his offences, I find that this charge cannot stand. Medora admitted under cross-examination that what the appellant requested him to do was to inform Santhiran that if he would pay up $26,290.12 and voluntarily get himself struck off the rolls by admitting the breaches, then that would be the end of the matter. This was confirmed by Santhiran. In those circumstances there was no question of concealing the offences. The conviction on the 9th charge is set aside and the fine imposed is ordered to be refunded to the appellant.

I now come to the submissions made on the sentences passed on the first eight charges. These sentences are attacked on two grounds. First, it is contended that as the fines imposed on the eight charges total $28,000, the provisions of section 17 of the Criminal Procedure Code and Article 7(1) of the Federal Constitution of Malaysia (applicable to Singapore by virtue of section 6(3) of the Republic of Singapore Independence Act 1965) have been breached and that the sentences are therefore illegal and should be set aside.

The appellant's offences were committed in 1976. His trial took place in 1978. In between these two dates, section 17 of the Criminal Procedure Code was

amended with effect from January 1, 1977. In 1976, i.e. at the date of the commission of the offences the provisions of section 17 were as follows: —

"Where a person is convicted at one trial of any two or more distinct offences the court may sentence him for such offences to the several punishments prescribed therefor which such court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court directs or to run concurrently if the court so directs, but it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of one single offence, to send the offender for trial before a higher court.

Provided that if the case is tried by a District Court or Magistrate's Court the aggregate punishment shall not exceed twice the amount of punishment which such Court in the exercise of its ordinary jurisdiction is competent to inflict."

In 1978, i.e. at the date of the trial, the proviso to section 17 reads as follows: —

"Provided that if the case is tried by a District Court or Magistrate's Court the aggregate punishment *of imprisonment* shall not exceed twice the amount of punishment which such Court in the exercise of its ordinary jurisdiction is competent to inflict."

The italicised words "of imprisonment" had been added by the Criminal Procedure Code (Amendment) Act, 1976, which came into force on January 1, 1977. The amendment had removed the restrictions relating to the aggregate of fines. Prior to this amendment, a District Court could not impose at one trial fines totalling more than $10,000 because the maximum fine that a District Court can impose in the exercise of its ordinary jurisdiction is $5,000 (section 11(3) of the Criminal Procedure Code). After the amendment, i.e. as from January 1, 1977, a District Court is quite clearly competent and has the lawful power to impose on a person convicted at one trial of any two or more distinct offences fines totalling more than $10,000. There is no restriction at all as to the total fines that it can impose. Article 7(1) of the Federal Constitution reads as follows: —

"7(1) No person shall be punished for an act or omission which was not punishable by law when it was done or made, and *no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.*"

The appellant relies on the second limb which I have emphasised. The argument is that when one reads the proviso to section 17 of the Criminal Procedure Code as it stood in 1976 when the offences were committed together with the provisions of Article 7(1) of the Federal Constitution of Malaysia, it is plain that the appellant could not be fined more than $10,000 in respect of all his nine charges.

In my judgment there is no merit at all in this submission. There is clearly some confusion on counsel's part for he has failed to distinguish between "punishment prescribed for an offence" and "powers of a court" to impose punishment. The punishment for an offence under section 213 of the Penal Code is laid down in that section. There has been no change in the punishment prescribed in section 213 between the date of the offences and the date of the appellant's trial. The change that has taken place is in the powers of a District Court to impose fines. Whereas at the date of the appellant's offences in 1976, a District Court could not impose fines totalling more than $10,000 it could do so at the date of his trial in 1978. It is not understood how this change can affect the appellant. No *ex post facto* legislation has been enacted altering or increasing the punishment under section 213 of the Penal Code. If the appellant had been tried by the High Court, he clearly could not raise the objection to the fines that he is now raising because the powers of a High Court in respect of the aggregate of fines are unlimited. How can he raise any objection to the aggregate of the fines imposed by the District Court when at the date of his trial the District Court's powers were also unlimited in that respect. The submission made on behalf of the appellant amounts to this: that the District Court in passing sentence on him should have restricted itself to its powers in 1976 when the offences were committed and should not have made use of the powers it had in 1978 at the date of the appellant's trial. The submission is manifestly wrong and is rejected.

Next, it is submitted that the appellant should have been tried in 1976 and had that been done, the District Court could not have imposed the fines that it imposed in 1978. The answer to that is that in 1976 the appellant could have been tried by the High Court which could have imposed the fines in question. Furthermore, an accused person has no fundamental right to pick the court or the time for his trial. In any case the appellant could not have been tried in 1976 because Santhiran's offences were reported to the police by the appellant in 1977 and it was only thereafter that the appellant's offences came to light. This submission is also manifestly wrong and is rejected.

The second ground is that the fines imposed are manifestly excessive having regard to all the circumstances of the case. Reliance is also placed on the provisions of section 71 of the Penal Code. Subsection (1) of this section provides:

"(1) Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided."

Illustration (a) makes the provisions of subsection (1) very clear:

"(a) *A* gives *Z* fifty strokes with a stick. Here *A* may have committed the offence of voluntarily causing hurt to *Z* by the whole beating, and also by each of the blows which make up the whole beating. If *A* were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating."

The appellant could have been charged with one offence to the effect that between March 4, 1976 and June 10, 1976 he accepted restitution of $297,956.12 in consideration of his concealing offences of criminal breach of trust committed by Santhiran. It would have been more favourable to the appellant if the prosecution had done this but then restitutions had been accepted on separate dates, some of them far apart, and it is not wrong on the part of the prosecution to have proceeded on eight separate charges. The charges are certainly not illegal. There is however considerable merit in the submission based on section 71 of the Penal Code.

It seems to me that in passing sentence the learned District Judge did not give sufficient consideration to two matters favourable to the appellant. First, credit should be given to the appellant for having regularly served on the Council of the Law Society ever since its inception.

The other matter which also deserves credit is the appellant's services to the University of Singapore, where for the last 18 years he has given his valuable time to teach at the Law Faculty of the University of Singapore. The success of the Faculty especially in the early years of its formation was in no uncertain terms due to the many practising advocates and solicitors like the appellant who volunteered to teach in their spare time or after office hours.

The fines imposed on the eight charges total $28,000 and for the reasons already given this sum appears to be manifestly excessive. Had the acceptance of restitution by the appellant been the subject of a single charge, as it could have been by reason of the provisions of section 71 of the Penal Code, the maximum fine that the District Court could have imposed on that charge would have been $5,000. But then the Public Prosecutor may well have asked that the charge be tried by the High Court. In my opinion justice will be done in this case if the fines on each of the eight charges are reduced from $3,500 to $1,500. The difference is ordered to be refunded to the appellant.

Before parting with this case, I am constrained to observe that the offence of accepting restitution of one's own property in consideration of concealing an offence should be abolished. It seems to me that it is not dishonest for a person to try and recover his own property from one who has committed criminal breach of trust in respect of it.

Appeal dismissed.

Solicitors: *Amarjit Rubin & Partners.*

MALAYSIAN REPORTS

GOOPAN s/o GOVINDASAMY v. A. SUBRAMANIAM & ANOR.

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.JJ.) November 7, 1979 & February 26, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 159 of 1978]

Practice and Procedure — Claim for negligence against public authority — Limitation — Expiry of period of limitation — Amendment of Legislation — Whether retrospective as to extend expired period — Public Authorities Protection Ordinance, 1948, s. 2.

In this case the appellant was injured when the fell off a tractor trailer on September 19, 1972. At the time of the accident the period for instituting the action against the public authority was twelve months, so that the right of action lapsed on September 19, 1973. However on June 13, 1974 the Public Authorities Protection Ordinance, 1948, was amended to extend the period for instituting action to thirty-six months. The appellant contended that by virtue of the amendment, his action was not time barred. The claim was dismissed in the High Court — see [1979] 2 M.L.J. 84. The appellant appealed.

Held: the amending Act was not truly procedural but affected vested rights and the time for instituting the claim was not enlarged by the amending Act. The amending Act was not retrospective in operation and had no application to a cause of action which was time barred before the Act was introduced.

Cases referred to:-

(1) *Kenderaan Bas Mara* v. *Yew Bon Tew & Anor.* [1980] 1 M.L.J. 311.
(2) *The YDUN* [1899] P. 236.
(3) *Rex* v. *Chandra Dharma* [1905] 2 K.B. 335.
(4) *K.K.K. Ramanathan Chettiar* v. *N.M. Kandappa Goundan* A.I.R. 1951 Mad. 314.
(5) *N.M. Yousoff* v. *Teo Kai Tee & Anor.* [1953] M.L.J. 188.
(6) *Maxwell* v. *Murphy* (1957) 96 C.L.R. 261.

FEDERAL COURT.

David Tay for the appellant.

Lim Beng Choon (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): The only ground of appeal, concerning the question of limitation, involves the construction of section 2(a) of the Public Authorities Protection (Amendment) Act, 1974 (Act A252) (referred to as the new Act).

Both appellant and 1st respondent were employees of 2nd respondent. On September 19, 1972 appellant was a passenger on his way to work on a tractor trailer driven by 1st respondent. Whilst so travelling he fell off the vehicle and suffered injuries. On May 15, 1975 he took out a writ suing the respondents for negligence.

Section 2(a) of the Public Authorities Protection Ordinance, 1948 (referred to as the old Act) reads: —

"2. Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect —

(a) the suit, action, prosecution or proceeding shall not lie or instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within twelve months next after the ceasing thereof."